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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 350

J. WILLISON SMITH, JR. and
ELIZABETH K. SMITH, His Wife

v

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and
PHILADELPHIA ELECTRIC COMPANY

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

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BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Pet. App. B. pp. 54-59) is reported in 434 Pa. 41, 252 A(2) 589 (1969). The Adjudication and Decree Nisi of the Chancellor of the Court of Common Pleas of Dauphin County sitting as the Commonwealth Court (Pet. App. B, pp. 24-42) is reported in 85 Dauph. 106 (1966). The Final Decree of the Court en banc of the Court of Common Pleas of Dauphin County (Pet. App. B, pp. 42-53) is reported in 86 Dauph. 376 (1966).

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on April 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania acted correctly in affirming the decree of the Court of Common Pleas of Dauphin County holding that the Pennsylvania Public Utility Commission has jurisdiction over an application by Philadelphia Electric Company for exercise of its power to appropriate property for the construction of the electric transmission line here involved and that the Federal Power Commission does not have jurisdiction over the *construction* of this electric transmission line?

STATUTE INVOLVED

The statutory provisions involved are Part II of the Federal Power Act, Section 201(b), 16 U.S.C. Section 824 (b) [Pet. App. A, p. 23] and Sections 201-209 thereof, 16 U.S.C. Sections 824-824h.

STATEMENT

This case arose out of an action in equity brought in the Court of Common Pleas of Dauphin County, Pennsylvania by J. Willison Smith, Jr. and Elizabeth K. Smith, his wife (hereinafter "Smiths"), against the Pennsylvania Public Utility Commission (hereinafter "Commission") under Section 1111 of the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended (66 P.S. 1441). Under this Section the Dauphin County Court is clothed with exclusive jurisdiction of all proceedings for injunctions where the jurisdiction of the

Commission is questioned. Philadelphia Electric Company (hereinafter "Philadelphia Electric") intervened and became a party to this action.

The relief sought by the Smiths was an injunction prohibiting the Commission from exercising jurisdiction over an Application filed with it by Philadelphia Electric, an electric utility subject to its jurisdiction, for approval of the exercise of the right of eminent domain in acquiring a right of way for the construction, operation and maintenance of a line for the transmission and distribution of electricity over and across a tract of land in Worcester Township, Montgomery County, Pennsylvania, owned by the Smiths. The Application was filed under the provisions of the Pennsylvania Act of Assembly of May 8, 1889, P.L. 136, as amended and supplemented by the Act of May 21, 1921, P.L. 1057 (15 P.S. 1182) (hereinafter "Act of 1921").

Under the Act of 1921, power is conferred upon an electric utility to appropriate property necessary for its corporate use in the construction, erection, operation or maintenance of its buildings, machinery, apparatus, plants, works, equipment and facilities for generating electric light, heat and power for transmission or distribution, provided that before any such company shall exercise the power, the Public Utility Commission, upon application shall find and determine after public hearing that the service to be furnished by the utility through the exercise of the power is necessary or proper for the service, accommodation, convenience or safety of the public.

The Smiths' Complaint in Equity challenged the jurisdiction of the Commission upon grounds that the Commission had no jurisdiction under the Act of 1921. The substance of Smiths' averments then were that Philadelphia Electric was not seeking to appropriate property necessary for its corporate use under the legislative grant of 1921, but was seeking to condemn Smiths' land as part

of a project known as the "Keystone Project", and for the benefit of other utilities both within and without the Commonwealth of Pennsylvania. At the hearing the Smiths injected the jurisdiction of the Federal Power Commission for the first time, contending that under Part. II of the Federal Power Act the Federal Power Commission (hereinafter "FPC") has sole and exclusive jurisdiction.

Both Philadelphia Electric and the Commission urged before the Dauphin County Court and the Supreme Court of Pennsylvania that there is nothing in Part II of the Federal Power Act granting Federal jurisdiction over the *construction* of electric facilities. The Pennsylvania Courts sustained Philadelphia Electric and the Commission in their contentions holding that the FPC under Section 824(b) of the Federal Power Act does not have jurisdiction over the construction of new facilities. The Pennsylvania Supreme Court stated that it need not determine whether this line is in interstate commerce within Section 824(b), because it agreed with the *courts below* that in this situation the FPC does not have jurisdiction over the *construction* of new facilities. (Pet. App. B, p. 56)

It is to be noted that this decision of the Supreme Court of Pennsylvania affirmed not only the Dauphin County Court in the Smiths' case but also the Commission and the Superior Court of Pennsylvania in *Charles S. Dunk and Bella M. Dunk* v. *Pennsylvania Public Utility Commission and Philadelphia Electric Company* where the same issue as to FPC jurisdiction was presented. (Pet. App. B, pp. 54-55 and 59) The Superior Court's decision in *Dunk* is reported at 210 Pa. Superior Ct. 183, 232 A (2) 231 (1967). The cases were combined for argument, and the Supreme Court of Pennsylvania affirmed the dispositions of the courts below both on the FPC issue and on all other issues in upholding Philadelphia Electric's right of condemnation. (Pet. App. B, pp. 57-59)

ARGUMENT

Points of Fact: The Keystone Project involved the construction of a steam electric generating station in the heart of the bituminous coal region of western Pennsylvania in Armstrong County, so that electric energy could be generated at the site of a coal mine and transmitted from that point to the service areas of the participating companies. (R. 66a) Seven electric companies participated: Atlantic City Electric Company, Baltimore Gas and Electric, Delaware Power & Light, New Jersey Public Service Electric and Gas, Philadelphia Electric, Pennsylvania Power & Light and Jersey Central Power & Light; and they own the station as tenants in common. (R. 67a-70a)

In the case of Philadelphia Electric it receives its share of the electric energy from the Keystone Generating Station at its Peach Bottom substation located in York County, Pennsylvania. From Peach Bottom, Philadelphia Electric constructed a 500 KV line to its Whitpain substation in Montgomery County, Pennsylvania.

It is this 500 KV line from Peach Botton to Whitpain which is involved in this proceeding and its construction required the condemnation of the Smiths' property. Its primary purpose was to make up the energy deficiency of Philadelphia Electric in 1967 and 1968 for its own customers and enable it to maintain service to its customers. (R. 63a; 89a-90a) Once the energy generated in Armstrong County reaches Philadelphia Electric's Peach Bottom substation, all of the energy passing over the 500 KV line from Peach Bottom to Whitpain is Philadelphia Electric energy and transmitted by Philadelphia Electric within Philadelphia Electric's service area for distribution to and utilization by Philadelphia Electric's customers. (R. 61a-63a) The Smith property is in Philadelphia Electric's service area and is served by Philadelphia Electric. (R. 73a)

Thus the line herein question was not constructed primarily for the purpose of interconnecting pool arrange-

ments, although it may at times be used for that purpose. It is common practice for electric companies throughout the United States to enter into interconnecting pool arrangements.* It is recognized that power pools result in more economical and more dependable service to the customers of each participating company. (R. 74a-75a)

Philadelphia Electric initially endeavored to negotiate with the Smiths for a right-of-way over their property but was unsuccessful. (R. 14a) As a result, Philadelphia Electric filed its application with the Pennsylvania Public Utility Commission requesting a finding of necessity for the service so that it might exercise its power of eminent domain. (R. 12a-15a) Thereafter the Smiths instituted their action to contest the Commission's jurisdiction. The Keystone Generating Station has been put into operation, and the 500 KV line involved in this proceeding has been constructed by Philadelphia Electric and put into service. At no time during the course of this litigation has there been any stay of the eminent domain proceeding. For all practical purposes the only matter left for determination between the Smiths and Philadelphia Electric is the amount of damages the Smiths should be paid for the right of way condemned.

Points of Law: The Smiths contend that the FPC has exclusive jurisdiction over all facilities for the transmission of electric energy in interstate commerce. Ergo, the FPC has jurisdiction over the *construction* of electric transmission lines. They are in error in the following respects: (1) in their refusal to recognize that Part II of the Federal Power Act does not give the FPC jurisdiction over the *construction* of an electric transmission line, even though it may be used in interstate commerce; and (2) in their complete misconception of the holdings in the cases they cite involving the Federal Power Act.

* Agreements concerning interconnecting pool arrangements are subject to and filed with the FPC including the interconnection agreement covering this line.

(1)

The Smiths rely upon Section 201(b) of the Federal Power Act (16 U.S.C. 824(b)) for their argument. It defines the scope of the FPC's jurisdiction as follows:

> "(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exploration of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

For their proposition that the FPC has exclusive jurisdiction the Smiths rely upon that portion of the second sentence of the above section beginning with: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy . . . ." The Smiths erroneously interpret this as an all-inclusive provision. The first clause of the section, however, reads: "The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce". The scope of the Commission's jurisdiction thus is limited. Regulation is expressly confined to the authority contained in those "specific" sec-

tions of the Act, i.e., sections 824-824h. These sections cover (a) interconnections and coordination of facilities, (b) disposition of property, (c) issuance of securities, (d) and (e) rates and charges, (f) adequacy of service, (g) cost of property and depreciation and (h) joint boards. *These are the subjects of Commission jurisdiction. Nowhere under the Federal Power Act is jurisdiction conferred upon the Federal Power Commission over the construction of transmission facilities.*

(2)

The Smiths have cited a number of cases involving the Federal Power Act, but they have not cited a single case where the FPC under Part II of the Federal Power Act exercised jurisdiction over the *construction* of electric transmission lines.

In *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U.S. 61, 87 L.Ed. 1258, 63 Sup. Ct. 953 (1943) it was found that Jersey Central Power & Light owned and operated facilities used in the interstate transmission of electric energy in enforcement of the "securities" provisions of Part II of the Federal Power Act.

The following cases involved the "accounting" requirements of the FPC under Part II of the Federal Power Act: *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F(2) 953 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 89 L.Ed. 1150, 65 Sup. Ct. 749 (1945); and *Federal Power Commission* v. *Arizona Edison Co., Inc.,* 194 F(2) 679 (1952).

In all three cases the assertions of jurisdiction by the Federal Power Commission were to regulate accounting practices on the basis that because of a sale at wholesale in interstate commerce in the *Hartford* case and the transmission of electric energy in interstate commerce in the

Connecticut and *Arizona* cases, these companies were public utilities as defined in the act and therefore subject to its "accounting" regulations.

Federal Power Commission v. *Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed. (2) 638, 84 Sup. Ct. 644 (1964) involved sales at wholesale in interstate commerce, and was under Part II of the Federal Power Act relating to the FPC's jurisdiction over "rates and charges".

Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F(2) 608 (1965) involved Part I of the Federal Power Act which deals with the use of navigable waters in the development of hydro-electric power projects. Under Part I of the Federal Power Act authority is conferred upon the FPC to issue licenses for the construction of hydro-electric projects (16 U.S.C. 797(e)), and the right of eminent domain is conferred upon a determination of necessity by the FPC (16 U.S.C. 814). No such power to license or to condemn property is conferred under Part II of the Federal Power Act.

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.Ed. 268, 70 Sup. Ct. 266 (1950) has no application here. It arose under the Natural Gas Act of 1938 (15 U.S.C. 717 f). The real significance of this case lies in the Natural Gas Act itself. Under this Act a certificate of public convenience must be obtained from the FPC for the construction and operation of facilities for the transportation or sale of gas by a natural gas company in interstate commerce subject to its jurisdiction. Furthermore, power of eminent domain is granted by this Act.

Obviously, the cases cited by the Smiths furnish no basis of authority for their argument that the FPC has jurisdiction over the *construction* of electric transmission lines. Being a creature of statute, the FPC has only those powers conferred by statute: *New York Public Service*

Commission v. *Federal Power Commission*, 257 F(2) 717 (1958).

Part I of the Federal Power Act and the Natural Gas Act, supra, make it plainly evident that Congress where it wanted the FPC to have jurisdiction over *construction* specifically gave it such jurisdiction.

The Smiths' test "of whether electric transmission lines fall within the jurisdiction of the Federal Power Commission is whether or not such lines are used in the transmission of interstate power and are not facilities used in local distribution" (Pet., p. 15), has no application here. Whether Philadelphia Electric owns and operates facilities used in the interstate transmission of electric energy may be a sufficient basis for a determination that it is a public utility as defined in the Federal Power Act and within the jurisdiction of the FPC. However, the scope of FPC jurisdiction over such a public utility is another matter entirely. The exercise of the FPC's regulatory powers must be within those spelled out in sections 824-824th of the Statute. Since no jurisdiction has been conferred upon the FPC over the construction of electric transmission lines, no determination in this case is necessary as to whether the line in question is a facility for the transmission of electric energy in interstate commerce, or for that matter, a facility used in local distribution. The Pennsylvania Supreme Court made this clear when it said: "*We need not determine whether this line, which will run solely within Pennsylvania, but which arguably will be part of or an offshoot of an interstate network, is in interstate commerce within Section 824(b), because we agree with the courts below that in this situation, the FPC does not have jurisdiction over the construction of new facilities.*" (Pet. App. B, p. 56)

Other reasons cited by the Smiths in their argument that the FPC has jurisdiction go to reasons why the FPC *should* have jurisdiction. They assert that Federal rate

control is impaired by lack of FPC jurisdiction over *construction.* This is not so, as the FPC has no jurisdictional deficiency in regulating sales at wholesale in interstate commerce. They also assert that state jurisdiction over electric transmission lines in general is inadequate. This assertion is recklessly made and without record support. The reference to the Federal highway program is completely without merit and has no application here.

What the Smiths seek is FPC jurisdiction over the construction of electric transmission lines used to transmit electric energy in interstate commerce. This can only be obtained through congressional action. Senate Bills 2139 and 2140 were introduced in the 89th Congress by the FPC itself, so as to extend FPC jurisdiction over the construction of electric transmission lines but they died in the 89th Congress. The Pennsylvania Courts properly commented that the FPC's lack of jurisdiction in this case is further indicated by those proposed Amendments to the Federal Power Act. (Pet. App. B, pp. 29, 57) (The Congressional Record and Senate Bills 2139 and 2140 were printed as part of the record in this case at R. 158a—170-½a.)

The simple answer to all of the Smiths' arguments is that no jurisdiction has been conferred upon the FPC over the construction of electric transmission lines. The Superior Court of New Jersey (Appellate Division) characterized the argument that the FPC has jurisdiction as "frivolous" saying:

> "Appellant's argument that the Board may have been without jurisdiction in this case is frivolous. It seems to contend that the Keystone Project involved the sale of electric energy in interstate commerce and consequently falls under the jurisdiction of the Federal Power Commission by reason of 16 U.S.C.A., § 824(b). This argument misconceives the purposes of

> the present proceeding, which was to determine whether Public Service could exercise its power of eminent domain on property it was unable to acquire by agreement of the owners. The federal enactment contains no provision empowering the Federal Power Commission to grant the authorization sought in this action by Public Service. That statute concerns rates, consolidations, purchase of securities, issuance of securities, etc.—none of which is involved here. This is no conflict between state and federal law. The Board has jurisdiction:" *"In re Petitions of Public Service Electric and Gas Company; and Appeal of Citizens Opposed to Power Towers, Readington Chapter, Inc. v. Public Service Electric and Gas Company and Board of Public Utility Commissioners of the State of New Jersey,* 100 N. J. Sup. 1, 241 A(2) 15, 23 (1968)."

It is to be noted that this case involved the construction of a 500 KV transmission line which is part of the same Keystone project involved herein and was constructed by one of the participants in said Project.

In *Pacific Power & Light Co.* v. *Federal Power Commission,* 184 F. (2) 272 (1950), an effort was made to construe Part I of the Federal Power Act as granting jurisdiction to the FPC over the construction of a transmission line which was not a part of the "project works" of a hydro-electric project. The Court refused to do so and concluded its opinion by stating:

> "We have said before, and we say again, that the houses of Congress and their committees are as readily available for these purposes as are the courts." (P. 275)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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